IN THE COURT OF APPEALS OF IOWA

No. 0-877 / 10-0261
Filed February 9, 2011

CONNIE ESTLING and
RICHARD ESTLING,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BRUCE A. WILLEY,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Plaintiffs appeal the district court's ruling granting defendant's motion for directed verdict. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Kent A. Gummert and Frank A. Comito of Guardineer, Comito & George, L.L.P., West Des Moines, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

In this legal malpractice action, plaintiffs Connie and Richard Estling allege defendant Bruce Willey, their former attorney, was negligent in his representation of them in the sale of Connie Estling's business, Hawkeye State Scale, Inc. The Estlings appeal the district court's ruling granting Willey's motion for directed verdict. The Estlings contend that as a result of Willey's negligence, they sustained damages because they lost the opportunity to sell their business to someone else. We affirm.

***I. Background Facts and Proceedings*.**

Plaintiffs Connie and Richard Estling are the founders of Hawkeye State Scale, Inc., a business that sells and services industrial and agricultural scales and related products. After Connie and Richard divorced, Connie became the sole shareholder of the company. Richard continued to work for the company.

In 1997 or 1998, Connie hired defendant, attorney Bruce Willey, as an attorney for the company. Willey, also a certified public accountant, prepared the company's taxes and sometimes helped in collecting debts for the company.

In approximately 2000, the Estlings decided to sell the business. Sometime in 2002, Connie met with agents of FNBCIowa, a business broker, about selling the business. FNBCIowa initially suggested an asking price of $400,000. Connie did not agree and refused to sign a listing agreement with that price. FNBCIowa then prepared another listing agreement with an asking price of $595,000. Connie signed this agreement on August 9, 2002.

Ultimately, two different offers to buy the business were received. The first offer was received from Duane Sytsma and Gary Knoor (hereinafter "the

buyers"), offering to purchase the company for $400,000.[1] The Estlings met with the buyers and rejected this offer. The buyers agreed to increase their offer, but stated they would not be able to come up with the full $595,000 at closing. In order to make the deal work for them, the buyers suggested an agreement wherein they would pay the Estlings over time. The buyers proposed that, in addition to the $400,000 purchase price of the company, they and the Estlings enter into employment agreements providing that the Estlings would work for the company for a certain period of time and be paid for their services.

After negotiations, an offer from the buyers was reduced to writing on August 30, 2002. The offer was a stock purchase offer, with a purchase price of $250,000 for the company stock and an amount equal to the lesser of $150,000 and the net current assets of the company. The buyers' offer provided that $5000 was to be paid upon acceptance of the offer, $95,000 was to be paid by the buyers at closing, an amount to be determined (the lesser of $150,000 and the net current assets) was to be paid ten business days after that amount was determined at the closing, and $150,000 was to be paid to the Estlings on January 2, 2008. The company's stock was to transfer to the buyers at closing. The offer also provided the buyers could assign some or all of their rights under the agreement to a corporation or limited liability company to be formed by the buyers.

Additionally, the offer referenced and incorporated an addendum, drafted by the buyers' attorney. Among other things, the addendum provided that the

[1] The buyers were apparently shown the wrong listing agreement with an asking price of $400,000.

buyers and the Estlings agreed "to execute employment and non-compete agreements." The employment and non-compete agreements would compensate the Estlings a combined total of $75,000 per year for five years, with the Estlings working a certain number of hours the first two years at the company. Some employment duties were delineated in the addendum. The addendum also provided for continued negotiation between the parties and delivery of the stock purchase agreement.

On September 3, 2002, the Estlings received a second offer from other persons. This offer was for an asset sale, offering to purchase the company and its assets for $595,000. The offer contained several contingencies, including being subject to financing and review by an attorney and accountant. This offer required acceptance by September 4, 2002.

The Estlings discussed the offers with Willey. On September 16, 2002, the Estlings signed and accepted the buyers' offer and the addendum.

Many negotiations followed with the buyers regarding finalizing the deal. Willey drafted the closing documents for the sale, and he continued to seek the Estlings' approval as to the terms of the contract. In drafting the documents, he requested personal guarantees from the buyers for the future payments to be made to the Estlings. The buyers refused. Additionally, Willey drafted a stock pledge agreement document for holding the company stocks in escrow until all payments were made by the buyers, which was also refused by the buyers. The buyers instead agreed to execute promissory notes secured by the stock for their obligations due after the closing date.

Closing occurred on November 4 and 5, 2002, during which negotiations continued. At one point, the meeting was stopped when the Estlings disagreed with the specified number of hours to be worked by them in the proposed employment contracts. Connie also stated she was concerned that the purchase agreement stated it was between Hawkeye State Scale, Inc., with Connie as the seller-shareholder, and A American Scale Company, L.L.C. (A American), as buyer. Willey told the Estlings they could walk away from the purchase if they wished. Connie stated that she understood that, but wanted to go forward as long as the Estlings were secure. The Estlings continued negotiations, and the number of hours to be worked by the Estlings in the contract was reduced to a number previously agreed to by the parties. The parties reached an overall agreement, and the parties then executed a stock purchase agreement. The buyers signed the agreement as managers of A American. A promissory note concerning the $150,000 payment due to the Estlings on January 2, 2008, was also executed in the name of A American, signed by the buyers as managers of that company.

Shortly after the closing, the relationship between the Estlings and the buyers deteriorated. The buyers claimed Connie made several misrepresentations concerning the company. Additionally, issues concerning the Estlings' employment arose, leading to the buyers terminating the Estlings' employment with the company. The Estlings asserted the buyers had not followed through on many of their obligations under their agreements, including distribution of certain assets in the company and personal belongings from the company's premises to Connie.

Willey sent letters to the buyers' attorney in an attempt to settle the parties' differences. Ultimately, in 2003, Willey and his law partner, Dave O'Brien, filed a lawsuit on the Estlings' behalf against the buyers. The buyers in turn filed counterclaims against the Estlings. Mediation was unsuccessful. Because Willey would likely be a witness in the pending lawsuit, he advised the Estlings to hire new counsel. Estlings subsequently hired new counsel.

On August 16, 2004, Estlings entered into a settlement agreement with the buyers and A American, the then sole shareholder of Hawkeye State Scale, Inc. As part of the settlement, the buyers and A American agreed to dismiss their counterclaim against Connie for intentional material misrepresentations. Additionally, A American agreed to pay Connie $70,185, with this amount constituting full satisfaction of the $150,000 note due in 2008. Also, Connie and Richard were to be paid $11,000 each in satisfaction of their claims for breach of the employment contracts.

On April 30, 2008, the Estlings filed suit against Willey for professional malpractice. They asserted Willey was negligent in representing them in the sale of the company, alleging he failed to (1) ensure that the obligations of the Estlings in connection with the sale under the closing documents were consistent with their obligations under the purchase agreement; (2) advise them of the necessity to secure, or otherwise protect, the collectability of future payments; (3) advise them of the risks in connection with agreeing to receive future payments; (4) ensure that the closing documents would not provide a basis to assert defenses to the payments required; and (5) ensure that the assets to be

distributed to Connie were properly accounted for.[2] Trial commenced in February of 2010.

At trial, attorney Matthew Berry testified as an expert for the Estlings. Berry opined that a reasonably competent Iowa attorney representing the Estlings, where the buyers' obligations were being transferred to a limited liability company, would have insisted upon the buyers signing personal guarantees. Berry testified Willey's "failure to demand personal guarantees under the circumstances of this case [was] evidence of failure to comply with the standard of care for Iowa attorneys." Berry also testified that under the circumstances of this case, a reasonably competent Iowa attorney would have required that the stock being sold be held by a stock escrow agent pursuant to a stock escrow agreement.

Connie testified that if she and Richard had insisted upon personal guarantees and a stock escrow agreement and the buyers had walked away from the deal, she would have pursued a deal with the persons who made the other offer. She acknowledged that that offer had lapsed and no counteroffer extending time had been entered into with those persons. She further testified that if she were unable to make a deal with those persons, she would have continued to run the company.

Willey testified that he requested personal guarantees from the buyers and a stock escrow agreement, but the buyers refused. He testified that he discussed the personal guarantees with the Estlings and he believed they

[2] The Estlings raised one other claim that was dismissed by the district court on summary judgment; that claim was not appealed and is not before us.

understood the significance of not having personal guarantees and wanted to move forward with the deal. He noted the Estlings voluntarily settled their lawsuit against the buyers in 2004 and the buyers could not have defaulted on the $150,000 note at the time of the Estlings' lawsuit against buyers because the note was not due until 2008.

After the Estlings' rested, Willey moved for a directed verdict, asserting the Estlings failed to prove his actions fell below the standard of care. Specifically, he argued the Estlings failed to show the buyers would have agreed to personal guarantees or the stock escrow agreement. He asserted that as such, he could not be the proximate cause of any alleged damages to the Estlings.

The Estlings conceded the buyers would not have agreed to personal guarantees or a stock escrow agreement. However, they argued Willey was still liable to them for failing to secure such agreements. They argued that the business was worth $595,000, and due to Willey's failure to secure such agreements, they lost the opportunity to sell the business for that amount to another.

After reviewing the cases cited by the parties, the district court granted Willey's motion for a directed verdict. The court explained:

> Looking at [*Blackhawk Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288 (Iowa 1988)], which I think sets forth pretty straight forwardly . . . that the burden of proving the proximate cause in the legal malpractice action is the same as it is in any other negligence action, that you have to show but for [defendant's] negligence, the loss would not have occurred.
>
> In this case, it has been shown that the buyers wouldn't have agreed to the very things that provide the grounds for negligence. This whole case has been tried on the grounds that there wasn't a personal guarantee; there wasn't a stock escrow agreement; and

> even Mr. Berry, whom I found very credible, said there is no way to force the other side to do that, and your only alternative then is to either walk away and not take the deal, continue to run the business, which [Connie] has said she would have done, but there is no way to force the other side into agreeing to those things. And without showing that they would have agreed to those, I don't think proximate cause has been proven here.
>
> I looked at the cases and lost opportunity . . . . You can't have it both ways. I mean, you can't say on the one hand, you know, you didn't give us the proper guarantees such as the escrow agreement and the personal guarantee, and then on the other hand argue, you know—in other words, . . . you are saying we would have gotten all of our money under this contract if we had those things.
>
> Here, the only evidence of lost opportunity which is the contract cash offer that . . . was highly speculative because of its termination provision and the fact that is was contingent upon financing and the okay of both lawyers and accountants.

The Estlings now appeal.[3]

***II. Scope and Standards of Review*.**

Our supreme court has recently summarized the applicable scope and standard of review in stating:

> We review a trial court's ruling on a motion for directed verdict for correction of errors of law. A directed verdict is required only if there was no substantial evidence to support the elements of the plaintiffs claim. Evidence is substantial when reasonable minds

[3] We note noncompliance with the rules of appellate procedure. "The name of each witness whose testimony is included in the appendix shall be inserted on the top of each appendix page where the witness's testimony appears." Iowa R. App. P. 6.905(7)(*c*). "The omission of any transcript page(s) or portion of a transcript page shall be indicated by a set of three asterisks at the location on the appendix page where the matter has been omitted." Iowa R. App. P. 6.905(7)(*e*).

This case was submitted at the conclusion of oral arguments. Some days later, the court received a letter by fax, and regular mail, from the Estlings' counsel drawing our attention to Plaintiff's Exhibit 20. A copy of the exhibit was included with the letter. Counsel for Willey moved to strike the letter and Plaintiff's Exhibit 20 from any consideration by the court arguing they were improperly submitted to the court after submission of the case. We grant the motion to the extent it refers to the Estlings' counsel's letter. Although Plaintiff's Exhibit 20 was not included in the parties' appendix, the exhibit is a part of the record before us. "The . . . exhibits filed in the district court . . . shall constitute the record on appeal in all cases." Iowa R. App. P. 6.801. We are not limited to considering only those items contained in the parties' appendix.

> would accept the evidence as adequate to reach the same findings. Where reasonable minds could differ on an issue, directed verdict is improper and the case must go to the jury.

Deboom v. Raining Rose, Inc., 772 N.W.2d 1, 5 (Iowa 2009) (internal quotations and citations omitted). We, like the trial court, view the evidence in the light most favorable to the party against whom the motion for a directed verdict is directed. *Jackson v. State Bank of Wapello*, 488 N.W.2d 151,155 (Iowa 1992).

***III. Discussion*.**

On appeal, the Estlings assert the district court erred in granting Willey's motion for a directed verdict. They contend Willey's representation fell below the standard of care. Further,

> [h]ad Willey represented [the Estlings] in the manner suggested by [the] Estlings' standard of care expert, the evidence established the [b]uyers would have walked away. There was substantial evidence as to the value and marketability of [the company]. [The] Estlings sustained damages because they lost the opportunity to sell their business to other parties if the protections [the] Estlings claim should have been in the sales documents had been insisted upon by Willey.

In other words, the Estlings claim it was Willey's fault in not causing the buyers to reject the deal, and as a result, the Estlings lost an opportunity to sell to someone else and were damaged thereby.

"Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake." *Martinson Mfg. Co., Inc. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) (citations omitted).

> To establish a prima facie claim of legal malpractice, the plaintiffs must produce substantial evidence that shows: (1) the existence of

> an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss, or damage. The failure to prove any one of these four elements defeats recovery for the plaintiffs.

Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996).

The key element here is causation.

> Causation is an essential element in a cause of action based on negligence. It is composed of two components. The first is a "but-for" or "cause in fact" component. The second is a "legal cause" or "proximate cause" component. A defendant's conduct is not a cause in fact "'[i]f the plaintiff would have suffered the same harm had the defendant not acted negligently.'" The defendant's conduct is not a legal cause "'if the harm that resulted from the defendant's negligence is so clearly outside the risks he assumed that it would be unjust or at least impractical to impose liability.'" The question of causation is normally for the jury to decide, but there are circumstances when the issue can be decided as a matter of law.
>
> Causation in a negligence action must be analyzed in the context of the relationship between those theories of negligence supported by the evidence and the theory of damages sought by the plaintiff. Actual causation, as well as legal causation, must exist between the breach of the duty of care and the damages sought.

Faber v. Herman, 731 N.W.2d 1, 7 (Iowa 2007) (internal citations omitted).

In *Blackhawk*, the Iowa Supreme Court discussed the issue of proving causation in a legal malpractice action, where the clients asserted their attorney negligently drafted an employment contract because it did not include a non-compete agreement:

> To recover, the injured must show that, but for the attorney's negligence, the loss would not have occurred. *Burke v. Roberson*, 417 N.W.2d 209, 211 (Iowa 1987) (citing D. Meiselman, *Attorney Malpractice: Law & Procedure* § 3:1, at 39-40 (1980)); R. Mallen and V. Levit, *Legal Malpractice* § 102, at 177-78 (2d Ed.1981). In an action based upon the negligent handling of a lawsuit, the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful. *Baker v. Beal*, 225

> N.W.2d 106, 109 (Iowa 1975). As applied to this situation, [the client] would be required to show that absent the lawyer's negligence, [the other party to the employment contract] would have signed a contract containing a covenant not to compete which would have effectively prevented the loss of the [client]. Essential to this chain of events, the [client] must show that [the other party to the employment contract] would have agreed to a covenant not to compete.

Blackhawk, 428 N.W.2d at 290. The court found in that case the record was devoid of any evidence that would allow the jury to infer that the other party to the employment contract would have agreed to a non-compete clause. *Id*. at 290-91. On that basis, the court concluded there was insufficient evidence to connect the client's claimed damages to the negligence of attorney. *Id*. at 291.

The case presented to us is a little different than that presented in *Blackhawk*. Here, the Estlings assert Willey should have insisted they obtain personal guarantees and a stock escrow agreement, but they make no attempt to show the buyers would have agreed to such conditions. In fact, the Estlings concede the buyers would not have agreed to the conditions and would have walked away from the deal if the Estlings had insisted on the conditions. So, the Estlings instead argue that had the buyers walked away, the Estlings could have then sold the business to someone else, presumably for the same or more than what the buyers had agreed to pay. They contend Willey is responsible for the buyers' failure to walk away.

It is the Estlings' burden to prove proximate cause. *Id*. at 290. In order to recover, the Estlings must show that, but for the attorney's negligence, the loss would not have occurred. *Id*. There must be a causal showing of actual financial loss. Under the Estlings' theory on appeal, their

> chain of causal injury, if any, must, therefore be traced to the denial of an opportunity to sell the [business] to some other willing buyer for its fair market value. Consequently, proof of damages does not depend on showing the solvency of the defendant buyers. Rather, it depends on showing the availability of other buyers in the marketplace willing and able to buy and pay for the [business].

Crutchley v. First Trust & Sav. Bank, 450 N.W.2d 977, 881 (Iowa 1990). Despite the Estlings' statement in their brief that there was substantial evidence as to the value and marketability of the company, we find a dearth of such evidence in the record. A jury cannot be left to speculate, but rather, must be provided with facts affording a reasonable basis for ascertaining the loss. *Blackhawk*, 428 N.W.2d at 291. The district court concluded: "Here, the only evidence of lost opportunity which is the contract cash offer that . . . was highly speculative because of its termination provision and the fact that it was contingent upon financing and the okay of both lawyers and accountants." We agree.

Under the circumstances of this case, the Estlings simply cannot show that, but for Willey's alleged negligence, their "loss," if any, would not have occurred. We therefore conclude the district court did not err in granting Willey's motion for a directed verdict.

***IV. Conclusion*.**

As the Estlings could not prove that their lawyer's alleged breach of duty proximately caused their alleged loss, the district court did not err in granting Willey's motion for a directed verdict. Accordingly, we find it unnecessary to address the issue raised on cross-appeal.

AFFIRMED.